United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7159

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7159

INTERNATIONAL ELECTRONICS CORPORATION AND ELECTRO MOTIVE CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

against

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN; JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

Defendants-Appellants-Cross Appellees,

J. KEVIN FOLEY,

Defendant.

B
P/S

BRIEF OF PLAINTIFFS-APPELLEES-CROSS APPELLANTS

J. Read Murphy
Murtha, Cullina, Richter and Pinney
Attorneys for Plaintiffs-Appellees-Cross Appellants
P. O. Box 3197
101 Pearl Street
Hartford, Connecticut 06103
(203) 549-4500

UNITED STATES COURT OF APPEALS
FILED
MAY 9 1975
SECOND CIRCUIT

TABLE OF CONTENTS

TABLE OF CASES CITED

RULES, STATUTES AND OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL ELECTRONICS CORPORATION and ELECTRO MOTIVE CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

No. 75-7159

-against-

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN; JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

Defendants-Appellants-Cross Appellees,

J. KEVIN FOLEY,

Defendant.

BRIEF OF PLAINTIFFS-APPELLEES-CROSS APPELLANTS

STATEMENT OF THE ISSUES

1. Was the District Court correct in disqualifying defendants-appellants' (hereafter "defendants") counsel where it is undisputed that such counsel (a) previously represented Electro Motive Corporation's predecessor; (b) claims to have represented both plaintiffs-appellees (hereafter "plaintiffs") in connection with the merger out of which this action arises and (c) has counterclaimed against plaintiffs for legal fees for such alleged services?

2. Did the District Court err in limiting the

disqualification to participation at the trial of this action thereby permitting defendants' counsel to continue their representation during the crucial pretrial proceedings about to be commenced where the undisputed facts as found by the District Court demonstrate that such representation is violative of Canons 4, 5 and 9 of the Code of Professional Responsibility?

3. Was the District Court correct in refusing to disqualify plaintiffs' counsel where it is undisputed that such counsel's representation of the Estate of Samuel Roskin bears no relationship to the subject matter of this action and the Estate has no interest in or connection with this lawsuit?

STATEMENT OF THE CASE

A. The Orders Appealed From

Defendants appeal from two orders, both entered on February 27, 1975 in the United States District Court, District of Connecticut (Blumenfeld, U.S.D.J.) (A51-56, 57-58.)

The first order (A51-56) granted the motion of plaintiffs and disqualified defendants' attorneys, Julius Apter and the members of the law firm of Apter, Nahum &

---

* "A" references are to the Joint Appendix filed by the parties.

Lenge from participating in the conduct of the trial of this case (A55).* Plaintiffs sought this disqualification of defendants' counsel on the ground that such representation violated Canons 4, 5 and 9 of the Code of Professional Responsibility of the American Bar Association (hereafter "the Code") and the related Ethical Considerations and Disciplinary Rules.

By notice of cross-appeal dated March 27, 1975, plaintiffs appealed from so much of that order "as may be construed as permitting said attorneys to continue representing defendants in this action in proceedings prior to the actual trial".

Subsequent to the filing of defendants' notice of appeal and plaintiffs' notice of cross-appeal, the District Court by order entered April 16, 1975, upon motion of plaintiffs for clarification or correction of the February 27, 1975 order, confirmed its prior decision to limit the disqualification of defendants' cousnel to "public" participation at the actual trial of the action.** The District

---

* Defendants' attorneys Apter, Nahum & Lenge are hereafter referred to as "the Apter firm".

** Plaintiffs were granted leave by this Court by order dated April 1, 1975, to move before the District Court, pursuant to Rule 60 of the Federal Rules of Civil Procedure, for correction or clarification of the February 27, 1975 order disqualifying defendants' counsel.

Court's memorandum decision endorsed on the motion papers is as follows:

> "A distinction was drawn, if not emphasized, between participation as counsel, at the trial, when he is to be a witness and other activities as counsel. It is the public use of the dual function which is condemned. 4-14-75 M.J.B., U.S.D.J."

PLAINTIFFS
D~~efendants~~s filed an amended notice of cross-appeal dated April 17, 1975 to embrace this latter order as well as the initial one.

The second order appealed by defendants denied defendants' motion to disqualify plaintiffs' counsel, J. Read Murphy, Esq., and any member or associate of his firm Murtha, Cullina, Richter and Kinney (hereafter "the Murtha firm") on the ground that the facts pertinent to that motion were "too remote to be relevant" (A57).

This brief is respectfully submitted in support of plaintiffs' cross-appeal and in response to defendants' brief filed in support of appeals from the two orders below entered on February 27, 1975.

B. The District Court's Decisions

Plaintiffs' motion for disqualification of defend-

*Plaintiffs were granted leave by this Court by order dated April 1, 1975, to move before the District Court, pursuant to Rule 60 of the Federal Rules of Civil Procedure, for correction or clarification of the February 27, 1975 order disqualifying defendants' counsel.

ants' attorneys sought an order "disqualifying Morris Apter Arnold E. Buchman, or any member of the firm of Apter, Nahum & Lenge from continued representation of any of the defendants in this case" (A2).* The District Court correctly found that Julius Apter, Esq., a named defendant and at all relevant times a senior member of the Apter firm would be a material witness at the trial of this action by reason of his participation in various capacities in the merger transaction out of which this action arises. The District Court stated:

> "In the course of the transaction which led to the sale of that stock of Electro Motive to the plaintiffs for more than seven million dollars, the defendant Julius Apter acted as counsel and as the principal negotiator for all stockholders, including himself. Not only was he a stockholder, he was an officer and director of Electro Motive and its attorney. In addition, he was sole trustee for seven trusts that were selling stockholders, and trustee of a principal creditor, which was required to modify its loan obligation as a condition of the sale. In wearing all of the different hats of these several interests, he acted in the appropriate capacity for each of them, actively participating in the

---

* All of the defendants, with the exception of defendant J. Kevin Foley are represented by the Apter firm. Plaintiffs' disqualification motion was addressed solely to the Apter firm and not to counsel for defendant Foley. Hereinafer the phrase "defendants' counsel" or "defendants' attorneys" will be used only in reference to the Apter firm and the word "defendants" to refer to all defendants, with the exception of defendant Foley.

> negotiations culminating in the sale. The contentions of the plaintiffs are that the course of these negotiations is laced with fraud, artifice, misrepresentation and the like by the defendants, and, that at the trial, the defendant Julius Apter will perforce be called upon to testify as a witness with respect to matters material to all of the issues presented by the defendants' denial of misconduct." (A52)

In addition, the District Court correctly found that the Apter firm had a personal stake in the outcome of the litigation by reason of the counterclaim it had pleaded against plaintiffs for fees for legal services allegedly rendered in connection with the merger transaction and other matters (A55, fn.3).* Recognizing as "unquestionable its inherent power to assure compliance with the Disciplinary Rules of the Code of Professional Responsibility and Canons of Judicial Ethics of the American Bar Association" (A53), the District Court properly held that the Apter firm's representation of the defendants constituted a violation of the Code, specifically Canon 5 and Disciplinary Rule (hereafter "DR") 5-101 and Ethical Consideration (hereafter "EC") 5-9.

---

* Defendants concede that defendant Julius Apter, notwithstanding his recent retirement from the Apter firm has an interest in his claim for fees. (Transcript of Oral Argument of Motion at pp. 53-54.

Where the District Court erred was in its failure to recognize that the admitted record facts also constitute a violation of Canons 4 and 9 of the Code and the relevant Disciplinary Rules and Ethical Considerations. Under binding decisions of the Second Circuit prompt remedial action is required. The ethical problem present at bar is not resolved by permitting the Apter firm to participate in upcoming pre-trial discovery, depositions, document production, motion practice, etc., and remove themselves from representation of the defendants only when and if the action comes to trial.

The District Court found that defendants' disqualification motion had been "stimulated by the plaintiffs' motion to disqualify." The basis for defendants' unsuccesful attempt to disqualify the Murtha firm is the fact that Donald P. Richter, Esq., a member of the Murtha firm, had been retained by three co-executors of the Estate of one Samuel Roskin to act as counsel in matters connected with the probate of the Roskin Estate (A57), an estate having no connection of any sort with the instant litigation and underlying transaction. Morris Apter, a member of the Apter firm, is one of the three co-executors of the Roskin Estate (A57). It is not

claimed that there is any relationship between probate of the Roskin Estate and the instant litigation. Nor is there any claim that Richter as attorney for the Roskin Estate could or would come into possession of any confidential information bearing on the matters involved in the instant action (A6; 8-11).

In denying defendants' disqualification motion the District Court held:

> "The attempt to inject into that situation a relation of confidentiality between Mr. [Morris] Apter as a client and Mr. Richter as his attorney is ingenious, but too remote to be relevant. As it happens, Mr. Richter is engaged on a matter which cannot possibly have anything to do with the litigation in this case. Furthermore, Mr. Richter is acting as attorney for the estate -- not for Mr. Apter. It is the Estate's interest not Mr. Apter's which is at stake in the processing of the Roskin Estate through probate."(A57-58).

C. Background of the Action

This action was commenced by the filing of a complaint on or about June 6, 1974, and charges the individual defendants, including Julius Apter, with material misrepresentations and omissions of fact in connection with an Agreement and Plan of Merger ("the Agreement") in violation

of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, as well as common law fraud and breach of contract. Plaintiffs seek damages in an amount in excess of $2,000,000 (Compl., ad damnum, p. 11).

The underlying transaction involved the merger of The Electro Motive Manufacturing Company, Incorporated ("ELMENCO") into IECONN, Inc. ("IECONN"), which thereafter changed its name to Electro Motive Corporation (hereafter "EMC"), one of the plaintiffs at bar and the surviving corporation operating the Elmenco business.

In connection with the merger, IECONN (now EMC) paid to the shareholders of ELMENCO for all of their outstanding shares an aggregate of $7,033,623.33. In addition, IECONN paid $1,026,740.90 into an Escrow Fund established pursuant to the terms of the Agreement and Plan of Merger to be held for the account of the selling shareholders subject to certain conditions not relevant to this appeal. Plaintiff International Electronics Corporation (hereafter "IEC") is the parent corporation of EMC. Julius Apter and the other individual defendants were the principal selling stockholders, officers, directors and/or executives of ELMENCO. The Apter firm is named as a defendant solely

because it is the Agent for the Escrow Account (A14-16), and thus a stakeholder.

D. The Involvement of Defendant Julius Apter and The Apter Firm In The Merger Transaction

Defendant Julius Apter was at all relevant times the senior member of the Apter firm (A5). He was a director and officer of ELMENCO and one of the principal selling shareholders (A14-15). In addition, he and his firm served as counsel to ELMENCO for many years prior to the merger and represented ELMENCO and all of the selling stockholders in connection with the merger transaction (A13-14). Thus, the Apter firm by virtue of its long-term representation of ELMENCO (now EMC) and its claimed representation of IEC has been the recipient of client's confidences which are now being used to the disadvantage of those clients.

Julius Apter also served as sole trustee for several trusts which were selling stockholders (A16, 52). In addition, he was a trustee of Joseph E. Lauter Greer and Philip Lauter Foundation, Incorporated, a principal creditor of ELMENCO, which was required to consent to modify its loan obligation of approximately $3,000,000 as a condition of the merger (A15-16). Julius Apter's personal share of proceeds payable to the selling stockholders totalled

$194,670.90; in addition, his interest in the Escrow Fund is $28,417.50 (A13, 14-15).

There is no factual dispute concerning the various capacities fulfilled by Julius Apter personally and as counsel. Nor is there any dispute that his law firm served as counsel to plaintiff EMC's predecessor in interest (A15-16). It is likewise undisputed that Mr. Apter personally participated in the negotiations and in the drafting of the pertinent documents, including the required representations which give rise to this lawsuit (A16, 52).

Specifically, Mr. Apter, representing ELMENCO and the selling stockholders (including himself) and Donald Shack, Esq., a member of Golenbock and Barell, attorneys for IEC, negotiated and drafted line by line, the Agreement signed by the parties, including Julius Apter (A16, 49). It is this Agreement, among other things, which evidences certain of the misrepresentations and omissions of material facts alleged to violate the Federal Securities Laws and state common law.

This includes the failure to disclose and/or misrepresentations concerning the existence of certain labor problems (A17; Compl., par. 13(a)); adverse changes in the financial condition and business of ELMENCO (A17; Compl., par. 13(b)); conduct not within the usual and ordinary course of business between the date of the Agreement (April 19, 1973) and the effective date of the merger (July 27, 1973) (A17, 37-38; Compl., par. 13(c)); ELMENCO's financial condition (Compl., par. 13(d)).*

In addition, the Apter firm claims to have represented both plaintiffs in the merger transaction. It has filed a counterclaim for legal fees against the plaintiffs alleging that:

---

* The conflict position of the Apter firm is illustrated by the alleged misrepresentation and omission concerning ELMENCO's labor problems. As counsel, the Apter firm and Julius Apter were directly involved in on-going labor negotiations concerning a representation claim asserted by a Jamaican labor union and received certain confidences from ELMENCO regarding same. Yet, the merger agreement negotiated, drafted and signed by Julius Apter affirmatively misrepresents the existence of this labor problem. At bar, the Apter firm defends the selling stockholders against a fraud claim alleged by ELMENCO's survivor (EMC), presumably utilizing the knowledge gained as ELMENCO's counsel.

> "At the request of the plaintiffs, the defendants Apter, Nahum & Lenge performed services in connection with the proposed merger of the reasonable value of $50,000..." (Counterclaim of Apter, Nahum & Lenge, Second Count, par. 2).

With respect to this allegation plaintiffs propounded the following interrogatory to defendants:

> "State whether Apter, Nahum and Lenge represented plaintiffs in connection with the Agreement and Plan of Merger." (Plaintiff's Interrogatory 32(f)).

Defendants responded "Yes" to this interrogatory, and proceeded to enumerate the following legal services allegedly performed on behalf of plaintiffs:

> "Meetings with officers and directors of Elmenco and with Benjamin B. Grossman and his attorneys, many telephone conferences in contemplation of agreement provisions, preparation and mailing of notices and proxies to stockholders, distribution of copies of merger agreement to stockholders and answering inquiries from same, preparation of stockholders and directors meetings in connection with merger, preparation of notices thereof and attendance at meetings, preparation of stock powers and powers of attorney for execution by stockholders, preparation of written opinions to plaintiffs, examination of restrictive agreements and revision of same." (Defendant's Response to Interrogatory 32(f)).

Notwithstanding the Apter firm's prior representation of EMC's predecessor and its alleged representation of plaintiffs in connection with the merger, the Apter firm has accepted employment in this action to defend against the claims asserted by its former client, and on behalf of the individual defendants has filed a counterclaim alleging that plaintiffs and their chief executive officer, Benjamin Grossman, in the negotiations leading to the merger, participated in a device, scheme and artifice to defraud.

POINT I

CANON 4 OF THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE RELATED DISCIPLINARY RULES AND ETHICAL CONSIDERATIONS BAR THE APTER FIRM FROM ANY PARTICIPATION IN THIS LITIGATION WHERE (1) THEY PREVIOUSLY ACTED AS ATTORNEYS FOR ELMENCO, PLAINTIFF EMC'S PREDECESSOR, AND (2) THEY CLAIM TO HAVE REPRESENTED PLAINTIFFS IN CONNECTION WITH THE AGREEMENT AND PLAN OF MERGER OUT OF WHICH THIS ACTION ARISES

The February 27 order of the District Court was correct in disqualifying the Apter firm from participating in the conduct of the trial of this action. However, it is respectfully submitted that insofar as the District Courts' orders of February 27 and April 16 permit the Apter firm to continue as defendants' counsel during all proceedings prior to trial, it erred. A review of both orders reveals that the District Court failed to appreciate the ethical problems posed by the Apter firm continuing as counsel of record for the defendants in the litigation in crucial proceedings prior to the actual trial.

It is undisputed that prior to the consummation of the merger, the Apter firm represented ELMENCO, the

corporation now merged into EMC, the surviving corporate entity. In addition, Julius Apter and the Apter firm served as counsel to ELMENCO in connection with the merger transaction which is the subject of this action, and asserts a counterclaim against plaintiffs for legal fees for services allegedly rendered. In that capacity as attorneys for ELMENCO, it is assumed the Apter firm came into possession of confidences or secrets of their client which they now have an opportunity to utilize to the disadvantage of their former client in the defense of this suit. The Apter firm's representation of the defendants at bar amounts to an attempt to "switch sides" and presents an opportunity to use "confidences" against ELMENCO's successor corporation contrary to the purpose and spirit of Canon 4. See Hull v. Celanese, No. 742126 (2d Cir. 3/26/75), slip op. 2545; Emle Industries v. Patentex, 478 F.2d 562 (2d Cir. 1973); Consolidated Theatres v. Warner Bros., 216 F.2d 920 (2d Cir. 1954); Doe v. A Corp., 330 F.Supp. 1352, 1354 (S.D.N.Y. 1971), aff'd, 453 F.2d 1375 (2d Cir. 1972) (per curiam).

Canon 4 provides:

> "A lawyer should preserve the confidence and secrets of a client."

DR 4-101,* entitled "Preservation of Confidences and Secrets of a Client", provides in pertinent part:

> "(B) Except when permitted under DR4-101 (C) a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client to the disadvantage of the client.
>
> (2) Use a confidence or secret of his client to the disadvantage of his client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

See also EC 4-1, 4-5 and 4-6.

The Disciplinary Rules relating to Canon 4 sharply restrict an attorney insofar as his ability to reveal or use a client's confidences. The philosophy and purpose underlying Canon 4 is to encourage full and frank disclosure by a client to his attorney. In this regard Ethical Consideration 4-1 states:

> "A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client... The observance of the ethical obligation

---

* The Preliminary Statement to the Code defines the Disciplinary Rules as follows:

> "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

> of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

As stated by the Court in Doe v. A Corp., supra:

> "The client must be secure in his belief that his lawyer will never disclose secrets confided in him." 330 F. Supp. at 1354.

Accord: United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955).

DR 4-101(C) specifically defines the four narrow situations in which a lawyer may reveal a client's confidences: (1) with the consent of the client after full disclosure; (2) when permitted under the Disciplinary Rules or required by law or court order; (3) in order to prevent or report the intention to commit a crime; (4) to establish his fee or defend himself against an accusation of wrongful conduct. None of these narrow exceptions to the general prohibition against disclosure is applicable at bar.

In Emle Industries v. Patentex, supra, Chief Judge Kaufman discussed the "weighty public policy considerations" mandating a strict application of Canon 4:

> "Without strict enforcement of such high ethical standards, a client would hardly be inclined to discuss his problems freely and in depth with his lawyer, for he would

> justifiably fear that information he reveals to his lawyer on one day may be used against him on the next. A lawyer's good faith, although essential in all his professional activity, is nevertheless, an inadequate safeguard when standing alone. Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation. Or, out of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety. In neither event would the litigant's or the public's interest be well served... These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage." 478 F.2d at 570-71.

At bar, the District Court recognized that "the court's inherent power to assure compliance with these prophylactic rules of ethical conduct is unquestionable." (A53). Its error lays in limiting the terms of the disqualification to the actual trial. The order below thus fails to remedy the ethical problem as required by decisions of this Court.

In determining the issue of disqualification, the former client is not required to affirmatively prove that confidences were actually passed. Such confidences are assumed once the fact of the attorney-client relationship is established. As stated by Judge Weinfeld in T. C. & Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y 1953):

> "I hold that the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorneys previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained." 133 F. Supp. at 268-269.

All that need be shown is that the later litigation is "substantially related" to the matters involved in the prior representation. Hull v. Celanese, No. 74-2126 (2d Cir. 3/26/75), slip op. 2545; Emle Industries v. Patentex, 478 F. 2d 562 (2d Cir. 1973); Consolidated Theatres v. Warner Bros., 216 F. 2d 920 (2d Cir. 1954); Doe v. A Corp., supra.

As this Court stated in Emle Industries v. Patentex, Inc., supra at 571:

> "...the court need not, indeed cannot, inquire whether the lawyer did, in fact, receive confidential information during his previous employment which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved. Thus, where 'it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject matter of his subsequent representation,' T.C. Theatre Corp., supra, at 269, it is the court's duty to order the attorney disqualified."

This litigation arises out of the merger transaction in which the Apter firm and its then senior partner claims to have rendered services to plaintiffs and involves EMC, the successor corporate entity to Elmenco, a client of the Apter firm. Clearly, the "substantial relationship" between the prior representation and the instant litigation has been demonstrated.

The orders of the District Court limiting the disqualification of the Apter firm to their "participation in the conduct of this trial" do not fully advance the policy and purpose behind Canon 4. Rather, those unduly limited orders give the Apter firm an opportunity to use, either deliberately or inadvertently, confidences obtained while acting as attorneys for ELMENCO and allegedly as attorneys for both plaintiffs throughout the course of the lengthy and vital pre-trial discovery proceedings about to commence. This confidential information could be used to the disadvantage of plaintiffs in connection with, among other things, depositions, interrogatories and document production requests. Such a procedure is directly contrary to the "strict prophylactic rule" applied by Chief Judge Kaufman in Emle Industries and to the warning of Canon 9 that "A lawyer should avoid even the appearance of professional impropriety." The Apter firm should not be permitted to circumvent the clear proscription of Canon 4, DR 4-101, EC 4-1, 4-5 and 4-6, as well as the relevant judicial decisions governing such a situation. Modification of the District Court's orders is required to effect the immediate and complete removal of the Apter firm as counsel in this action.

POINT II

THE APTER FIRM'S REPRESENTATION OF THE DEFENDANTS IS PROHIBITED BY CANONS 5 AND 9 OF THE CODE

The Apter firm's representation of the defendants in violation of Canon 4 of the Code and the related Disciplinary Rules and Ethical Considerations therein as discussed in Point I supra is sufficient to mandate disqualification from all phases of this litigation. Moreover, there are additional undisputed factors present at bar that require the Apter firm's disqualification from this lawsuit.

First, it is not disputed that Julius Apter, who at all relevant times was a senior partner of the Apter firm, will be called as a material witness both in defense of plaintiffs' complaint as well as in support of the Apter firm's counterclaim against plaintiffs for legal fees. The defendants conceded in the District Court that:

> "It is apparent, that by virtue of the part played by Julius Apter in the [underlying merger] transaction, and by dint of his being named a defendant, he will be called upon to testify in this suit." (Def. Memo. p. 3).

Under these circumstances, the Apter firm's acceptance of employment as counsel for the defendants in this action flies in the face of Canon 5.

DR 5-101, entitled "Refusing Employment When the Interest of the Lawyer May Impair His Independent Professional Judgment", provides in pertinent part:

> "(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it if obvious that he or a lawyer in his firm ought to be called as a witness...[exceptions not material omitted]".

The District Court quoted this Disciplinary Rule in its decision and order (A55).

The Apter firm knew on or about June 6, 1973, when they received a copy of the complaint, that Julius Apter, then senior partner of the Apter firm, would be called as a material witness. Indeed, these facts were called to their attention by plaintiffs' counsel at the commencement of this litigation before the motion for disqualification was made. It was the obligation of the Apter firm arising from DR 5-101(B) to voluntarily withdraw from this case -- there should have been no need for plaintiffs to make a disqualification motion before the District Court.* The Apter

* Defendants argue that "a motion to disqualify counsel being equitable in nature should be made with reasonable diligence and promptness after the facts have become known." (Def. Br. p. 14, fn. 8). Defendants charge that plaintiffs' motion was "a tactic of harassment" since plaintiffs knew even before the commencement of this action that defendants would be represented by the Apter firm. The simple fact is that from the inception of this action plaintiffs sought to have the Apter firm voluntarily withdraw as counsel for the defendants. One day after this action was filed, a partner of the Apter firm inquired of plaintiffs' counsel whether he

[Footnote continued on next page]

firm cannot utilize its failure to abide by the proscription against their accepting employment to now remain in the action until trial.

The Federal Courts have consistently enforced the prohibitions of these Canons and Disciplinary Rules, and barred attorneys from representing clients in cases where the attorney is or will be a witness. E.g., United Parts Manufacturing Company v. Lee Motor Products Inc., 266 F. 2d 20 (6th Cir. 1959); Lou Ah Yew v. Dulles, 257 F. 2d 744 (9th Cir. 1968); Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 329 (E.D. Wisc. 1954); Sorrin v. Pacific Finance Corporation, 37 F. Supp. 527 (S.D.N.Y. 1941). The rule is the same in the state courts of Connecticut. State v. Blake, 157 Conn. 99, 103, 249 A. 2d 232 (1968).

[Continued from previous page

had any objection to the Apter firm appearing as attorneys for the defendants. By letter dated July 2, 1974, plaintiffs' counsel advised the Apter firm that it would be necessary for the Apter firm to disqualify themselves. By letter dated July 5, 1974, the Apter firm by Morris Apter advised plaintiffs' counsel that the Apter firm refused to voluntarily withdraw from this action. After several additional telephone conversations with Morris Apter, plaintiffs' counsel wrote him on August 22 and proposed that a joint letter be written to Judge Blumenfeld requesting an in-chambers conference. By letter dated September 3, Mr. Apter refused to accede to this request. On September 12, plaintiffs' counsel wrote to Judge Blumenfeld requesting such a conference. The District Court declined to hold such a conference absent the agreement of defendants' counsel. It was only after plaintiffs exhaused these efforts to have the Apter firm voluntarily withdraw that plaintiffs by motion dated October 4, 1974 moved for disqualification of the Apter firm.

Jennings Co. v. DiGenova , 107 Conn. 491 A. 866 (1928).*

The sound public policy behind this rule was well expressed by the Connecticut Supreme Court in Jennings Co., v. DiGenova, supra at 496-497;

> "Our rule is founded upon our belief that it is unfair to the client that his case should be presented through witnesses whom the trier will necessarily treat as interested, not only through the zeal of advocacy, but also through interest in the result of the trial, instead of as witnesses without self-interest or other zeal than that of the ordinary witness. It is also primarily founded upon the obvious dictate of public policy, which requires that the profession of the law shall be practiced so as to avoid the bringing of distrust and suspicion upon its members who serve as witnesses in establishing the facts of a complaint or defense, and then as advocates in pressing home to their trier the truth of their statement as witnesses. Our court has always looked with great disfavor upon the giving of testimony by an attorney who is a participant in the trial of the cause in which he is a witness for the reason that we hold it to be against sound public policy and the integrity and welfare of the Profession of the law that the attorney should be at one and the same time the advocate and material witness for his client." (emphasis supplied.)

* As noted by Judge Blumenfeld, Rule 2(f) of the local rules of the District Court of Connecticut "recognizes the authority of the 'Code of Professional Responsibility of the American Bar Association' (as approved by the Judges of the Connecticut Supreior Court as expressing the standards of professional conduct expected of lawyers)". (A 53)

Defendants argue that the public policy behind this strict rule of prohibition does not apply at bar because Julius Apter has recently retired and "no longer practices law." (Def. Br. p. 9). This argument misconstrues the purpose and function of Canons 5 and 9.

The fact is that at all times relevant to the allegations of the complaint Julius Apter was the senior member of the Apter firm and known as such in the community.* He will therefore be testifying concerning events which occurred at the time he and his firm were serving as attorneys for ELMENCO and the selling shareholders. That he may be a "recently retired partner" does not remove "the appearance of impropriety" enunciated by Canon 9 and avoid the ethical problem of the Apter firm being regarded as something more than disinterested professional advocates.

No meaningful distinction can be drawn between a

*Although Julius Apter claims to have retired in January 1974 (Def. Br. p. 3), it is significant that the Apter firm continued to hold him out as a member of the firm during 1974, and his name appeared on the firm letterhead, in the telephone listings and in Martindale-Hubbell. Indeed, papers were transmitted to the District Court under cover of letter bearing Julius Apter's name on its masthead. (Transcript of Oral Argument p. 42-43.) Moreover, defendants' counsel below conceded Julius Apter did not withdraw from the Apter firm until October 1974, some 4 months after the commencement of this action (Id, at p. 53).

law firm and its individual partners where the Code is concerned.* Any practice which would raise a question about the integrity of the law firm responsible for the litigation must be avoided under Canons 5 and 9.

Nor is the prohibition of the Code with respect to a lawyer undertaking the dual role as a lawyer-witness changed because the lawyer is a named party. If anything, Julius Apter's interest in the outcome of this litigation and the fear that he "will be inclined to warp the truth in the interest of his client" is heightened by the fact that he is the client and a party defendant rather than a witness. **See** Jennings Co. v. DiGenova, supra. These additional factors make more acute the need for the Apter firm to abide by the Code and desist from representation of six defendants in this action.

* Nor does Julius Apter's recent retirement erase the fact that the confidences presumably obtained while acting as plaintiffs' attorney and attorney for ELMENCO is imputed to the other members of his firm. As the Court held in Federal Savings and Loan Insurance Corp. v. Fielding, 343 F. Supp. 537, 544 (D. Nev. 1972):

> "[T]he knowledge of a partner of a law firm gained during confidential relationships with clients is imputed to the other partners and each member of the partnership is equally constrained by the evidentiary privilege and the ethical precept of nondisclosure as well as the Canons interdicting conflicts of interest."

Defendants mistakenly contend that "Canon 5, its antecedents and its elaborations are for the benefit of the client" (Def. Br. p. 8). Presumably defendants would have this Court rule that they as the clients have the last word as to whether the Apter firm should be disqualified from this lawsuit. Under the Code and the reported case decisions this judgment is for the Court which is obliged to enforce the Code of Professional Responsibility if the public's trust in the integrity of the Bar is to be preserved. To be sure, each Court decision disqualifying counsel has the effect of depriving a party of counsel of his choice, but this cannot deter the Court from prompt remedial action where there is an appearance of impropriety. Emle Industries, Inc. v. Patentex, supra at 565; Hull v. Celanese Corp., supra, slip. op. at 2547. As stated in Richardson v. Hamilton International Corporation, 469 F. 2d 1382, 1385-6 (3d Cir. 1972):

> "Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety."

The "appearance of impropriety" arising from defendants being represented by the Apter firm which was directly involved as counsel in the underlying merger transaction and whose then senior partner is charged with participating in the alleged misrepresentations is manifest. This appearance impropriety is heightened when the personal financial interest of Julius Apter and the Apter firm in the subject matter of this litigation is analyzed:

(1) Julius Apter while a senior partner of the Apter firm, realized $194,670.90 from the sale of his ELMENCO stock (A13);

(2) Julius Apter's proportionate interest in in the Escrow Fund under the control of the Apter firm as Escrow Agent is $28,417.30 plus accrued interest (A14, 15); and

(3) Julius Apter, notwithstanding his recent retirement from the firm, will share in any recovery obtained by the Apter firm under its counterclaim for legal fees for services allegedly rendered to plaintiffs in connection with the underlying merger transaction.

The naked statement in defendants' brief on this appeal that Julius Apter "has neither expection nor entitlement

to professional fees earned or to be earned in this case" is less than a candid statement of the record facts. At the oral argument of this motion before the District Court, Arnold Buchman, Esq., a member of the Apter firm, while claiming that Julius Apter would not share in fees paid to the Apter firm for representation of the defendants in this litigation, admitted that:

> "[Julius Apter] would have an interest in the fees which are part of the counterclaim, which would be for services rendered prior but during the course of the transaction which is the subject of this action."
>
> * * *
>
> "If Your Honor please, it would be anticipated by the members of the [Apter] firm that if the firm were successful on its counterclaim, which is a claim for services rendered while Julius Apter was an active participant in the practice that Julius Apter would share in any such award on the counterclaim." (Transcript of Oral Argument, pp. 53-4).

Julius Apter's personal interest viewed in connection with the other factors present at bar emphasizes the need for complete disqualification of the Apter firm.

The Code generally discourages attorneys from becoming "financially interested in the outcome of litigation"

since such interest may have an adverse effect upon the lawyer's exercise of free judgment on behalf of the client. EC 5-7, see also EC 5-11; DR 5-103. The fact that Julius Apter's firm undertook the representation of five other defendants knowing that its senior partner had a substantial proprietary interest in the outcome of this litigation would appear contrary to the spirit of these provisions of the Code.

Certainly, the "appearance" of this matter contravenes Canon 9. Defendants' counsel's financial interest in the outcome of this litigation, their prior representation, and their involvement in the underlying transaction, coupled with the other factors present at bar, may affect their judgment as to litigation strategy, the possibilities of settlement or other aspects of this litigation. Even a doubt or suspicion of real or apparent lack of objectivity is sufficient to warrant the Apter firm's disqualification from this lawsuit. As Chief Judge Kaufman cautioned in Emle Industries, Inc. v. Patentex, supra:

> "The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case." 478 F. 2d at 571.

POINT III

NEITHER THE RIGHTS OF JULIUS APTER NOR THOSE OF THE APTER FIRM WERE WRONGFULLY ABRIDGED BY THE DISQUALIFICATION OF THE APTER FIRM

Defendants contend that Judge Blumenfeld's order disqualifying the Apter firm deprived Julius Apter and the Apter firm of their "undisputed right" of appearing on their own behalf and conducting their own case citing only 28 U.S.C. 1654 (Def. Br. pp. 5-6).* Defendants' argument is both factually and legally without merit. In the first instance Julius Apter has not appeared pro se in this action. By defendants' own admission "Julius Apter has not entered his appearance in this action on behalf of anyone." (Def. Br. p. 9).

Undoubtedly recognizing the lack of merit of this argument the defendants also argue that "the same statute which gives Julius Apter the unqualified right to appear on his own behalf gives him the alternative right to engage counsel to appear for him" and that the effect of

---

* Section 1654 provides:

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

the disqualification order below is to deny Julius Apter his "unqualified" right to counsel. This argument is also without any merit.

Every judicial decision disqualifying an attorney for violating the Code perforce "denies" the client his choice of counsel. At bar the District Court was simply performing its judicial duty under the Code and its local rule 2(f) to supervise the conduct of the members of its bar, where that conduct ran afoul of the Code. Julius Apter is, of course, perfectly free to retain counsel of his own choosing - provided that such representation does not violate the Code of Professional Responsibility.

In Emle Industries v. Patentex, supra, this Court recognized that affirming the District Court's order of disqualification "will, to be sure, deprive plaintiffs of highly qualified counsel of their own choosing." 478 F. 2d at 565. Nevertheless, the District Court's disqualification order was affirmed on the ground that permitting plaintiffs' counsel to "employ information disclosed to him in confidence" would "work a serious injustice upon the [defendants] and would tend to undermine public confidence in the bar." Id.

In Hull v. Celanese, supra, this Court in affirming the District Court's disqualification order recognized the importance of the plaintiff's right to counsel of her choice. Nonetheless, it held that this consideration "must yield...to considerations of ethics which run to the very integrity of our judicial process." Slip. Op. at 2547 Defendants themselves recognize that their right to representation by counsel of their choice is not absolute; they concede such representation must "be in accordance with the rules of the District Court." (Def. Br. p. 7). As noted above, local rule 2(f) adopts the Code and to that extent modifies the right of a party in a civil litigation to "free" choice of counsel.*

Finally, the Apter firm also claims that the District Court's disqualification order "denies Morris Apter

* The judicial decisions interpreting 28 U.S.C. 1654 have arisen in the context of criminal proceedings. This statute finds its genesis in Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789). The United States Supreme Court has stated that the right to pro se representation is a "correlative right" to assistance by counsel. Adams v. United States ex rel. McCann, 317 U.S. 269 (1942); United States v. Plattner, 330 F.2d 271 (2d Cir. 1964). Of course, the right to representation by counsel or pro se in the context of a criminal case involves policy considerations far different than these present in a civil litigation. It is submitted that just as a parties' right to counsel of his choice in a civil litigation has been held to be modified by the Code, so too is a parties correlative right to pro se representation.

the right to appear on his own behalf and members of Apter, Nahum & Lenge to appear on its own behalf, even though plaintiffs have made Morris Apter and Apter, Nahum & Lenge defendants." (Def. Br. p. 6).

The simple fact is that the complaint seeks no affirmative relief against the assets of the Apter firm. The firm is named as a defendant solely because it is a stakeholder - the Agent for the Escrow fund established pursuant to the terms of the Agreement. In this capacity, there is nothing for the Apter firm to defend. The firm is named only so that all necessary parties will be before the District Court.

This pro se argument advanced by the Apter firm is a transparent effort to remain in this case as attorneys in some fashion and thereby achieve by indirection that which the Code prohibits. If the Apter firm is permitted to remain in this action as attorneys pro se they would necessarily have a right to engage in pre-trial discovery and thus take advantage of the confidences obtained in prior representation and thereby disregard Canon 4 and the Disciplinary Rules and Ethical Considerations therein. Only a complete and immediate disqualification of the Apter firm from participation in this litigation can achieve the "strict prophylactic rule" enunciated by Judge Kaufman in Emle Industries.

Under these circumstances, where no affirmative relief is demanded against the Apter firm, the rule appropriate to enforcement of the public policy underlying the Code requires that the law firm's right to appear pro se must give way to the overriding need to avoid undermining the public confidence in the Bar. Emle Industries, Inc. v. Patentex, supra, at 565.

POINT IV

THE DISTRICT COURT WAS CORRECT IN DENYING DEFENDANTS' MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL

As stated to Judge Blumenfeld (Transcript of oral argument, p. 26), if he had any doubts whatsoever, he need only state them and we would withdraw and save him the necessity of writing an opinion. The District Court did not express such doubts, and ruled as it did.

We repeat this proposal to this Court. We do not believe it to be in the best interests of the courts, nor of the bar, to dignify proceedings such as this by lengthy

arguments defending an attorney's right to remain in a case.

The record facts and applicable law completely supports the District Court's denial of defendants' motion.

The sole basis for defendants' motion to disqualify the Murtha firm from reprsenting the plaintiffs, was that Donald P. Richter, Esq., a member of that firm, had been employed to act as counsel by three co-executors of an estate in matters connected with the probate of that Estate. Morris Apter, a member of the Apter firm, is one of the three co-executors. In denying this motion the District Court held:

> "The attempt to inject into that situation a relationship of confidentiality between Mr. Apter as a client and Mr. Richter as his attorney is ingenious, but too remote to be relevant." (A57)

Defendants' brief at bar "agree[s] with Judge Blumenfeld's conclusion that Richter's representation of co-executor Morris Apter can have no substantive connection to the issues in this case involving Morris Apter, defendant"

(Def. Br. p. 15). Thus, the "substantial relationship" test required to be present for a disqualification order to issue is not met by defendants' motion. See Hull v. Celanese, No. 74-2126 (2d Cir. 3/26/75), slip op. 2545; Emle Industries v. Patentex, 478 F.2d 562 (2d Cir. 1973); Consolidated Theatres v. Warner Bros., 216 F.2d 920 (2d Cir. 1954); Doe v. A Corp., 330 F. Supp. 1352, 1354 (S.D.N.Y. 1971) aff'd, 453 F.2d 1375 (2d Cir. 1972) (per curiam).

Defendants urge that the Murtha firm should nevertheless be disqualified because "Richter's obligations and duty to this client extends beyond "confidentiality" (Def. Br. p. 15). Defendants do not contend and their brief does not cite this Court a single Canon, Disciplinary Rule or Ethical Consideration which has been violated or could be violated as a result of the Murtha firm's representation of the plaintiffs at bar. Nor do defendants cite a single case to support their proposition that representation of an estate of which Morris Apter is a co-executor prohibits the law firm representing that Estate from naming Morris Apter's firm as a defendant in an entirely unrelated matter solely in their capacity

as escrow agents. Moreover, defendants do not advance a meaningful response to the telling point made by the District Court that representation of the Estate is not synonomous with representation of an executor in his individual capacity (A58).

The fact that no affirmative recovery is sought against the Apter firm and that it is named in this lawsuit solely in its capacity as a stakeholder is conveniently overlooked by defendants in their brief. Defendants seek to obfuscate this simple issue before this Court by recklessly charging that in the instant litigation there have been "attacks of Richter's law firm on Morris Apter" and charges against Morris Apter "if only vicariously, with champerty..." (Def. Br. p. 18). These incorrect characterizations are regrettable; moreover, they are inaccurate and unnecessary.

No conflict or violation of the Code arises from the inclusion of the Apter firm as Escrow Agent, as a defendant in this action. The District Court was perceptive in recognizing that defendants' motion to disqualify the Murtha firm was nothing more than an aggressive reaction to plaintiffs' motion to disqualify the Apter firm (A57).

The decision and order below denying defendants' motion on the grounds, among others, of a lack of substantial relationship between the litigation at bar and representation of an unrelated Estate was eminently correct. It should be affirmed.

CONCLUSION

For each of the foregoing reasons, the order of the District Court granting plaintiffs' motion disqualifying defendants' counsel should be modified so as to provide for immediate and complete disqualification of the firm of Apter, Nahum & Lenge from participation in all aspects of this litigation.

The order of the District Court denying defendants' motion to disqualify plaintiffs' counsel should in all respects be affirmed.

Defendants also request costs and disbursements of this appeal in accordance with law.

Dated: May 9, 1975

Respectfully submitted,

J. READ MURPHY
MURTHA, CULLINA, RICHTER AND PINNEY
Attorneys for Plaintiffs-Appellees-
Cross Appellants
P. O. Box 3197
101 Pearl Street
Hartford, Connecticut 06103

ADDENDUM

RELEVANT PROVISIONS OF CODE OF PROFESSIONAL RESPONSIBILITY

Canon 4: A Lawyer Should Preserve the Confidences and Secrets of a Client

EC 4-1: "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

EC 4-5: "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure."

EC 4-6: "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration."

DR 4-101: Preservation of Confidences and Secrets of a Client.

"...(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

Canon 5: A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

DR 5-101: Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

"...(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

DR 5-103: Avoiding Acquisition of Interest in Litigation.

"(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case."

Canon 9: A Lawyer Should Avoid Even the Appearance of Professional Impropriety

Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL ELECTRONICS CORPORATION AND ELECTRO MOTIVE CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

against

JULIUS FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN; JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

Defendants-Appellants-Cross Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 9th day of May, 1975, he served two copies of the Brief of Plaintiffs-Appellees-Cross Appellants on Apter, Nahum & Lenge, Esqs.

the attorneys for the Defendants-Appellants-Cross Appellees by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. 101 Pearl Street, Hartford, Connecticut ~~) N.Y.~~, that being the address designated by them for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this

9th day of May, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976